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No. 06-

IN THE

Supreme Court of the United States

QUINTEZ WREN HODGES,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Do the Sixth, Eighth and Fourteenth Amendments require a defendant to demonstrate actual prejudice where trial counsel failed to investigate and challenge the State's case at the guilt phase, failed to investigate mitigating evidence, and left the defendant essentially unrepresented as a result of counsel's mental illness, lack of experience and qualifications, and chemical dependency?

a. In the alternative, do the Sixth, Eighth and Fourteenth Amendments allow a defendant to be convicted and sentenced to death under the above circumstances where counsel's deficient performance prejudiced the defendant by failing to investigate and challenge the State's case at guilt, failing to investigate mitigating evidence, and leaving him essentially unrepresented?

2. May a State, consistent with the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, affirm a death sentence predicated upon false testimony by manipulating procedural rules on direct appeal and post-conviction proceedings to avoid consideration of evidence demonstrating the falsity of the State's penalty phase testimony?

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Appendix C — Order Of The Supreme Court Of Mississippi, Court Of Appeals Of The State Of Mississippi Denying Petition For Rehearing Dated March 8, 2007 ..... 170a

Petitioner Quintez Wren Hodges respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court denying post-conviction relief is reported at 949 So. 2d 706 (Miss. 2006) (App. 1a-47a). The order of the Mississippi Supreme Court denying rehearing is unreported (App. 170a). The opinion of the Mississippi Supreme Court denying relief on direct appeal is reported at 912 So. 2d 730 (Miss.) (App. 48a-169a), *cert. denied*, 126 S. Ct. 739 (2005).

STATEMENT OF JURISDICTION

On December 14, 2006, the Mississippi Supreme Court denied petitioner's request for post-conviction relief. Petitioner's timely petition for rehearing was denied on March 8, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

PROCEDURAL, CONSTITUTIONAL, AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides that: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury. . . ." U.S. CONST. amend. VI.

The Eighth Amendment to the Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

The Fourteenth Amendment to the Constitution provides that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

Mississippi Rules of Appellate Procedure provide that:

> Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. . . . Where the appellant is represented by counsel who

> did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

Miss. R. App. P. 22(b).

STATEMENT OF THE CASE

A. Introduction

Mr. Hodges has been failed by the legal system. Both prior to and during his capital trial, he was represented by grossly ineffective counsel who failed to prepare his case, much less adequately represent him during those proceedings. Compounding this flaw, the State committed prosecutorial misconduct through improper questioning of Mr. Hodges and his mother during sentencing, furthered by an inappropriate presentation of "rebuttal" testimony by then-Assistant District Attorney ("ADA") Kitchens who testified falsely.

B. Representation Prior To Trial

After the State indicted Mr. Hodges on charges of capital murder, felony burglary and kidnapping (Pet. Ex. 11), the court appointed public defender Carrie Jourdan. *See* App. 56a. Ms. Jourdan, in the two years she represented Mr. Hodges, spent about eight hours with him, including court appearances. (T. 32-33.) Ms. Jourdan filed no substantive motions and undertook no investigation into Mr. Hodges' background. Even petitioner's inexperienced trial counsel recognized Ms. Jourdan's failure to properly prepare for Mr. Hodges' capital murder trial. (T. 22-23; Pet. Ex. 6 ¶ 3.)[1]

Knowing that he faced the death penalty and his attorney had not prepared his case for trial, petitioner retained new counsel – Michael Miller – in August 2001. The State argued,

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1. Citations to the trial transcript appear as "T.__." Citations to exhibits submitted during post-conviction proceedings are cited as "Pet. Ex. __", "Resp. Ex. __" and "Reply Ex. __."

and the trial judge speculated, that Mr. Hodges replaced Ms. Jourdan in the hopes of gaining a continuance. *See* App. 56a. There is, however, no evidence that this is the case.[2] Regardless, that fateful decision was a mistake.

Only a year out of law school, and having never tried a case – much less a capital case – Mr. Miller had only one strategy: to obtain a continuance. He was, however, unaware of the procedures for motion practice and both filed the motion two weeks late and failed to support it with evidence. (T. 22-26, 47, 51.) The State called Ms. Jourdan during the hearing on the motion for continuance and she testified that she explained to Mr. Miller when he took on the case that she "felt from a motion standpoint it was not in a posture to be tried without some extensive effort." (T. 34.) The trial court denied the continuance motion. (T. 49.)

Worse yet, Mr. Miller became "ill" and failed to prepare during the 21 days he represented Mr. Hodges before trial. (Pet. Ex. 6 ¶ 6.) For those pre-trial motions counsel actually filed, he failed to support those motions with evidence or legal authority. (*E.g.*, T. 26.) In fact, Mr. Miller's paralegal prepared those motions. (Pet. Ex. 20 ¶ 8.)[3] The failure to investigate the State's case or develop a case in mitigation, however, is even more egregious.

Unbeknownst to Mr. Hodges, Mr. Miller suffered from severe chemical addiction and bipolar disorder. (Pet. Exs. 20-21, 29.) Indeed, after Mr. Hodges' trial, Mr. Miller's parents committed him to a psychiatric facility because, among other things, he: (i) suffered from bipolar disorder; (ii) had threatened suicide; and (iii) believed his phones were tapped and the CIA,

2. Indeed, as early as October 2000, Mr. Hodges wrote Ms. Jourdan expressing concern about her representation. She replied by noting they had discussed his case during court appearances.

3. Mr. Miller's paralegal provided an affidavit stating that he "was unprepared and on drugs and medication." (Pet. Ex. 20 ¶ 13.)

FBI, KKK and "other agencies are out to get him." (Pet. Ex. 29.)

After his sentencing, petitioner wrote Mr. Miller raising his concerns with counsel's performance. Rather than address those concerns, Mr. Miller demonstrated his mental instability by threatening Mr. Hodges. In that letter, he stated:

> Fuck what somebody tells you – unless you hear from me or your folks, then assume it's a lie. And I want to make something else clear to you to: when you said in that first letter that you didn't want me to take this as a threat or something like that – it really pissed me off. You are in no position to threaten me, and just so you know, . . . if anybody ever comes up on me to try and test me I've got a 12 gauge and a .44 and a steady hand waiting for them – God rest the souls and have mercy on anybody who ever decides to test me – because I will show no mercy. I want you to understand that.

(Reply Ex. A.)

C. Hodges' Capital Murder Trial

Counsel's lack of strategy and gross incompetence thoroughly infected the trial. Counsel's ineffective cross-examination of the State's witnesses and failure to object to the admission of irrelevant and highly prejudicial prior bad acts evidence left the State's case essentially unchallenged. Throughout trial, the court repeatedly chastised Mr. Miller for his complete lack of knowledge and experience. (*E.g.*, T. 747 ("You are beginning to annoy and irritate the Court through your inexperience.").) For example, the court offered to let counsel borrow the court's copy of the rules of procedure to review over a lunch break. (T. 746-48.) Mr. Hodges' counsel was so unfamiliar with the proper procedure for a capital trial that the judge stopped him during opening argument at the guilt

phase to correct counsel's misstatement that he would not be given an opportunity to address the jury at sentencing. (T. 548-49.)

Although Mr. Miller engaged experienced counsel on the eve of trial, co-counsel was not prepared to conduct a capital trial. Indeed, at the time co-counsel agreed to appear, he had another trial scheduled for the same time, but believed a continuance of petitioner's trial would be obtained. (T. 25-26.) Co-counsel later stated that "Mr. Miller had neither developed nor considered what his approach would be in a legally clear and coherent manner," but "was adamant that he would proceed in trial his own way." (Pet. Ex. 21 ¶ 8.) Neither lawyer performed any investigation. (T. 41-44; Pet. Ex. 6 ¶ 5.) Mr. Miller employed a "strategy" of admitting petitioner's involvement, but seeking an instruction on the lesser-included offense of manslaughter. This strategy, including its risks, was never discussed with Mr. Hodges. Moreover, counsel did nothing to effectuate this strategy and the court refused to give such an instruction. (T. 886-87.)

After the jury returned verdicts of guilty on all counts, the trial immediately progressed to capital sentencing. (Pet. Ex. 19.) Mr. Miller admitted that his limited pre-trial efforts were directed solely at the guilt phase and there was no prior discussion of mitigation. (Pet. Ex. 6 ¶ 11.) Out of desperation and reflecting the total lack of any planned strategy, counsel sought an extension of time to prepare for the sentencing phase. The trial court denied this request.

Counsel's lack of preparedness was abundantly clear. Counsel put on only a few witnesses (including petitioner), but did not prepare them to testify. (*Id.*) Indeed, the proffered testimony was found to have "opened the door" for the introduction of prior bad acts evidence, App. 75a-78a, essentially helping prove the State's case in aggravation.

At sentencing, the State relied on its contention that Bessie Tatum, the decedent's mother, previously interceded on Mr.

Hodges' behalf in an earlier burglary case by asking that he be sentenced to the Regimented Inmate Discipline ("RID") program instead of the 15-year sentence the State sought. (T. 983-86, 1016-17.) District Attorney Allgood, during cross-examination of petitioner's mother, asked: "Isn't it true that [ADA] Kitchens, representing the State, asked the judge . . . to give your son 15 years in the penitentiary?" (T. 985-86.) Mr. Allgood also asked, "isn't it true that the information was provided to the court by your son's lawyer that Ms. Tatum had requested that [petitioner] be sentenced instead to the RID program?" Ms. Hodges said she did not hear these things. (*Id.*)

On cross-examination of petitioner, Mr. Allgood asked, "during the course of that plea process, at one point in time your lawyer stood up and told that judge that Ms. Tatum did not want you to go to the penitentiary, didn't he?" (T. 1016.) He also asked, "Isn't it true that also the [ADA] who was handling the case, Jim Kitchens, stood up and affirmed that this was so; that that was in fact what Ms. Tatum requested?" (*Id.*) Finally, Mr. Hodges was asked, "Do you recall that the State . . . asked and sought that you be sent to the penitentiary for 15 years?" (T. 1017.) Mr. Hodges denied hearing each of these statements. (T. 1016-17.)

The State called ADA Kitchens as a rebuttal witness. He testified that he met with Ms. Tatum on the morning of the burglary plea in the courthouse library, that "she said she did not want him to go to the penitentiary," and that Mr. Hodges "put on a couple of witnesses to ask for something less than what we were asking for because we were asking that he go to the penitentiary. . . . [f]or 15 years." (T. 1025-30.) ADA Kitchens then asserted that petitioner's counsel told the Court that "Ms. Tatum, the victim's mom in this burglary, had indicated . . . that she does not wish that Quintez Hodges be sent to the penitentiary," and Mr. Kitchens confirmed that statement. (T. 1027.) In closing argument, Mr. Allgood repeated these

assertions, suggesting that Mr. Hodges deliberately refused to admit to them in his testimony:

> [W]hether he wants to acknowledge it or not, he was given a huge measure of grace because rather than being sent to the penitentiary for 15 years as the State . . . was seeking, he received intercession from the most unlikeliest of sources and through her good will and through her efforts . . . was sentenced instead to the functional equivalent of probation.

(T. 1077.) The jury, with little by way of mitigating evidence, not surprisingly, accepted the State's theory of the case and sentenced petitioner to death. (T. 1081-82.)

As demonstrated on both direct appeal and in post-conviction proceedings, the plea hearing transcript (Pet. Ex. 1) demonstrates that the State's evidence and theory were false and there was no good faith basis for the cross-examination of petitioner or his mother. Specifically, that transcript demonstrates that Ms. Tatum did not intercede on petitioner's behalf and the State made no recommendation as to sentence, much less state that it was seeking a 15-year prison sentence.

STATE COURT PROCEEDINGS

On September 13, 2001, a jury convicted Mr. Hodges of capital murder, kidnapping and burglary and, later that same day, sentenced him to death. Mr. Hodges, represented by different counsel on appeal, raised claims of ineffective assistance of counsel, prosecutorial misconduct, and trial court error. The Mississippi Supreme Court affirmed Mr. Hodges' conviction and sentence on March 10, 2005, and denied rehearing on June 9, 2005.

Mr. Hodges, through the Mississippi Office of Capital Post-Conviction Counsel (the "MOCPCC"), timely filed a state post-conviction petition. On May 20, 2006, the undersigned counsel was appointed. On December 14, 2006, the Mississippi Supreme

Court denied Mr. Hodges' post-conviction petition, and denied his motion for rehearing on March 8, 2007.

HOW THE ISSUES WERE DECIDED BELOW

A. Ineffective Assistance Of Counsel

Mr. Hodges appealed his conviction and sentence, presenting eighteen issues for review by the Mississippi Supreme Court. *See* App. 57a-60a. Included were several claims that he was denied effective assistance throughout his capital trial. *See id.* The Court noted that the trial "court found that even though Miller lacks the experience to try a capital murder case, he has obtained experienced co-counsel who has tried capital murder cases before." App. 56a. In addressing some of Mr. Hodges' ineffective assistance of counsel claims, the Court considered certain extra-record evidence. *See* App. 83a. Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the Court denied Mr. Hodges relief on all of these claims. App. 83a-107a. The Court, however, did not address the claim that counsel failed to provide effective assistance throughout trial.

On post-conviction review, the Court rejected Mr. Hodges' claim that trial counsel was ineffective because of inadequate time, experience and resources, and as a result of his addictions and mental disorders. *See* App. 29a-31a. The Court recounted Mr. Miller's lack of experience, bipolar disorder, his use of prescription and illegal drugs, and his civil commitment. *See* App. 29a. Distinguishing *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001), the Court rejected this claim based on its dim view of the mitigation evidence developed (without the benefit of discovery procedures) by appellate and post-conviction counsel. *See* App. 29a-30a. The Court concluded that "[t]his evidence of drug use and illness may explain some of Michael Miller's behavior before and during Hodges's trial," but it did not change the Court's decision that Mr. Miller provided effective assistance. App. 30a-31a.

B. Prosecutorial Misconduct

On direct appeal, Mr. Hodges demonstrated that the State presented false evidence through the testimony of then-ADA Kitchens and used that testimony to impeach Mr. Hodges and his mother. *See* App. 64a-65a. In support of his claim, as required by state procedural rules, Mr. Hodges provided the Court with a copy of the transcript from his plea hearing on the prior burglary charge. *See id.*

The Mississippi Supreme Court, having denied Mr. Hodges' motion to expand the record, refused to consider the transcript. *See id.* The Court relied on then-recently amended Rule 22 of the Mississippi Rules of Appellate Procedure which permitted review of an issue only if "fully apparent from the record," despite acknowledging that "this amendment does not apply to the case sub judice." *Id.*

The Court acknowledged the prejudicial effect of questioning witnesses without an evidentiary basis, but stated that by offering ADA Kitchens' testimony, the State "proved there was an evidentiary basis for the [cross-examination] of Ms. Hodges and the defendant." App. 65a-66a. Despite its refusal to consider the plea hearing transcript, the Court stated that Mr. Hodges "has not offered any proof that Kitchens' testimony was false, that it was material to the verdict or that the State knew that it was false." *Id.*

On post-conviction proceedings, Mr. Hodges again raised this claim and submitted the plea hearing transcript. *See* App. 8a-13a. In response, the State submitted an affidavit by former ADA Kitchens. Significantly, Mr. Kitchens never affirmed that the State communicated a "recommendation" of a 15-year sentence to the court, nor that, if there had been such a recommendation, it was discussed where Mr. Hodges and his mother could have heard it. (Resp. Ex. A at 1.) An affidavit from ADA Rogillio, who covered the hearing, never mentions a sentencing recommendation. (Resp. Ex. B.)

The Court did not address the substance of petitioner's argument or consider the plea hearing transcript. Instead, the Court held that "res judicata bars Hodges from raising this issue again." App. 13a.

REASONS FOR GRANTING THE PETITION

An exercise of this Court's supervisory authority is warranted because the Mississippi Supreme Court denied Mr. Hodges' post-conviction petition despite violations of his rights under the Sixth, Eighth and Fourteenth Amendments. First, he was denied effective assistance of counsel resulting from trial counsel's mental illness, lack of experience, and drug abuse in contravention of the authorities of this Court and the several circuits. Second, the violation of Mr. Hodges' due process rights by the presentation of false evidence was exacerbated by the state court's failure to vindicate his rights in further violation of due process jurisprudence.

I. THE STATE COURT'S DENIAL OF MR. HODGES' INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM CONFLICTS WITH CLEAR SIXTH AMENDMENT JURISPRUDENCE

Mr. Hodges' counsel provided ineffective assistance in violation of the Sixth Amendment. His substandard representation satisfies *Strickland*'s two-part test. Mr. Miller's performance was so deficient it resulted in "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687. As a result of trial counsel's deficient performance, Mr. Hodges is entitled to a presumption of justice. Moreover, Mr. Miller's performance actually prejudiced Mr. Hodges and the "errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* In a death penalty case, the ultimate inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance

of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

A. Counsel's Inexperience, Mental Illness, And Drug Abuse Rendered His Performance Deficient

Trial counsel provides deficient performance where his representation falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Strategic decisions require deference; however, "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (counsel's investigation fell short of professional standards and prejudiced petitioner; quoting *Strickland*, 466 U.S. at 690-91). The Sixth Amendment does not guarantee error-free counsel, but it does guarantee that counsel will advocate on behalf of the accused ensuring that a true adversarial confrontation occurs. *See United States v. Cronic*, 466 U.S. 648, 656-57 (1984). The "mere physical presence" of counsel does not satisfy the Sixth Amendment. *Javor v. United States*, 724 F.2d 831, 834 (9th Cir. 1984).

Trial counsel's representation was constitutionally deficient. Mr. Miller's lack of experience, mental illness, and drug abuse rendered him incapable of providing effective assistance both before and during trial. (*E.g.*, Pet. Ex. 20 ¶ 3, 11, 13.) Mr. Miller failed to prepare for Mr. Hodges' capital trial because, as his paralegal noted, he was high on crystal meth and was abusing prescription drugs. (*Id.*) This pattern of drug abuse was not suspended during trial. Co-counsel noted that: "Mr. Miller openly stated to me at the end of one of the days during the trial that he was going to smoke marijuana. . . . His appearance during the whole course of the trial was consistent with that of sustained drug use. . . ." (Pet. Ex. 21 ¶ 9.) Subsequently, the civil commitment papers filed by Mr. Miller's parents noted his history of alcohol and substance abuse. (Pet. Ex. 29.) Moreover,

those papers noted that Mr. Miller had "social performance disturbance" in his job and in his general behavior. (*Id.*)

Mr. Miller's deficiencies manifested in multiple ways during his representation of petitioner, including providing inaccurate advice regarding possible sentences, failing to investigate and challenge the State's case, and failing to investigate available mitigation evidence. Indeed, although it rejected this claim on post-conviction review, the Mississippi Supreme Court noted "[t]his evidence of drug use and illness may explain some of Michael Miller's behavior before and during Hodges' trial." App. 30a-31a. That Court's rejection of this claim conflicts with Sixth Amendment jurisprudence which mandates that courts consider counsel's qualifications in resolving ineffective assistance claims. *See, e.g., United States v. Tucker*, 716 F.2d 576, 580 (9th Cir. 1983) (considering counsel's lack of familiarity with procedural rules, inexperience and lack of skill in determining ineffective assistance as to both performance and prejudice).

B. Counsel's Deficient Performance Prejudiced Mr. Hodges

1. Counsel's deficient performance constituted *per se* prejudice.

Strickland generally requires a petitioner to establish that counsel's performance was both deficient and prejudicial. In some situations, however, counsel's deficient performance presumptively prejudices the defense. 466 U.S. at 692. For example, "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Id. See, e.g., Tippins v. Walker*, 77 F.3d 682, 686 (2d Cir. 1996) (presuming prejudice where counsel slept at trial); *Javor*, 724 F.2d at 834 (same; noting that "unconscious or sleeping counsel is equivalent to no counsel at all").

This Court has never addressed whether counsel's lack of experience, mental illness and chemical dependency create a presumption of prejudice. The few courts that have addressed this issue uniformly apply the two-part *Strickland* test. *See generally* Jeffrey L. Kirchmeier, "Drink, Drug and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement," 75 NEB. L. REV. 425, 455-60 (1996). *But see State v. Keller*, 223 N.W. 698, 699 (N.D. 1929) (finding that the defendant was "clearly prejudiced" where counsel was so drunk the defendant in effect had no counsel). A panel of the Second Circuit held that counsel was *per se* ineffective as a result of, among other things, counsel's admitted physical and mental incapacity two weeks prior to trial. *See Bellamy v. Cogdell*, 952 F.2d 626, 631 (2d Cir. 1991). On rehearing en banc, however, the Second Circuit, in a 7-6 decision over a strong dissent, reversed the panel decision and held that counsel's incapacity did not constitute *per se* prejudice. *See Bellamy v. Cogdell*, 974 F.2d 302, 307-09 (2d Cir. 1992).

Mr. Hodges was denied a fair trial because his attorney was constructively absent during trial. For example, co-counsel stated that "Mr. Miller had neither developed nor considered what his approach would be in a legally clear and coherent manner." (Pet. Ex. 21 ¶ 8.) Moreover, he "allowed much damaging testimony to come before the jury by either not limiting the witness or by 'opening the door' to such damaging testimony." (*Id.*) *See also* App. 75a-78a. Trial counsel's incompetence, ignorance and debilitation due to mental illness and drug abuse were so serious that it amounted to a constructive denial of counsel. Mr. Hodges was tried in the "partial absence of counsel" in violation of the Sixth Amendment. *Cf. Javor*, 724 F.2d at 833-34 ("[Petitioner]'s sixth amendment right to counsel was violated not because of specific legal errors or omissions indicating incompetence, but because he had *no* legal assistance during a substantial portion of his trial."). A criminal defendant

"requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Mr. Miller's deficient performance is presumptively prejudicial. The Mississippi Supreme Court decided an important issue of federal law that has not, but should be, settled by this Court.

2. Counsel's deficient performance actually prejudiced Mr. Hodges.

If Mr. Hodges must show actual prejudice, he need only show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. But for Mr. Miller's deficient performance, there is a reasonable probability that the result of the guilt and punishment phases of Mr. Hodges' trial would have been different. Counsel's mistakes are too numerous to detail, but include failing to test the State's case at the guilt phase, failing to prepare Mr. Hodges to testify, and generally failing to investigate Mr. Hodges' capital case. If this Court does not grant this petition, even though the state court has had several opportunities to address the constitutional errors that infected his trial, petitioner arguably will be forced to raise this claim under the more exacting deferential standards applied in federal habeas proceedings.

Failure to properly advise regarding sentencing options. Numerous circuit courts have held that it is ineffective assistance of counsel to provide misinformation regarding "potential sentencing exposure" when it results in a petitioner's rejection of a plea offer. *See, e.g., United States v. Gordon*, 156 F.3d 376, 378-81 (2d Cir. 1998) (per curiam); *Magana v. Hofbauer*, 263 F.3d 542, 550-51 (6th Cir. 2001) (defendant prejudiced where counsel incorrectly advised that sentences would be concurrent and not consecutive). Counsel erroneously advised Mr. Hodges

that the options were a "life sentence, life without parole, and the death sentence," a misstatement reinforced by the trial court. (T. 103-04.) Mr. Hodges was prejudiced by this misinformation because, had he been properly advised that his only sentencing options were the death penalty or life without the possibility of parole, he would have accepted the plea offer. (Pet. Ex. 2 ¶ 6.)[4]

Failure to investigate and challenge State's case. Adequate investigation is a requisite of effective assistance of counsel. *See, e.g., Higgins v. Renico*, 470 F.3d 624, 633 (6th Cir. 2006) (counsel ineffective for "fail[ing] to challenge the credibility of the prosecution's key witness"); *Nixon v. Newsome*, 888 F.2d 112, 115 (11th Cir. 1989) (counsel ineffective for failing to impeach key witness with inconsistent statements "sacrifice[ing] an opportunity to weaken the star witness's inculpatory testimony"). Counsel's failure to investigate and confront key prosecution witnesses prejudiced Mr. Hodges.

First, Anthony Betts provided critical testimony regarding Mr. Hodges' alleged intent; however, a simple investigation would have revealed that Mr. Betts was a convicted felon. (Pet. Ex. 4.)[5] Counsel's failure to investigate or discover easily obtainable impeachment evidence regarding a key witness for the State prejudiced petitioner by leaving a key prosecution

4. The Mississippi Supreme Court failed to properly apply federal law to this claim. *Strickland* requires a criminal defendant to show only a "reasonable probability" he would have accepted the plea; however, the Court held there was no prejudice because Mr. Hodges failed to "prove" he would have accepted the plea. App. 23a; App. 94a-95a. Thus, the state court's opinion was contrary to established federal law. *See, e.g., Magana v. Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (state court "placed too great a burden of proof on the defendant to show prejudice . . .").

5. The state court assumed Mr. Miller failed to conduct an adequate investigation, but found that Mr. Betts' testimony was cumulative and thus no prejudice resulted. *See* App. 92a-94a.

argument essentially untested. *Cf. Rompilla v. Beard*, 545 U.S. 374, 389-90 (2005).[6]

Second, Cora Johnson, laid the foundation for Mr. Hodges' alleged motive to commit assault and intent to kill; prerequisites for felony burglary and thus capital murder. (T. 577-78.) Counsel made no investigation of Ms. Johnson. Thus, counsel did not locate, until the eve of trial, a series of letters demonstrating that Ms. Johnson manipulated her relationship with petitioner, including with respect to the paternity of her daughter, and was far from the innocent teenager portrayed by the State. (Reply Ex. C.) Indeed, on post-conviction review, the Court noted that "this information might have been helpful, and defense counsel should have been aware of it. . . ." App. 23a.

Finally, had counsel performed any investigation, he would have learned that other witnesses had knowledge of events surrounding the crime, including that, contrary to Ms. Johnson's testimony, Mr. Hodges did not call her the night of the killing. (Reply Exs. D, N-O.) Such information would have cast doubt on Ms. Johnson's credibility and may have caused a jury to disbelieve her testimony. *See, e.g., Stewart v. Wolfenbarger*, 468 F.3d 338, 360-61 (6th Cir. 2006) (counsel ineffective for failing to investigate and present witnesses impeaching State witness). Absent evidence of intent, Mr. Hodges would be ineligible for the death penalty.

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6. Further, the State identified Reginald Martin as a potential witness at trial. Mr. Martin was incarcerated, but the State obtained a Transport Order authorizing transportation of Mr. Martin to testify at petitioner's trial. The State never called Mr. Martin; yet, trial counsel never inquired why Mr. Martin was not called. *See, e.g., Anderson v. Johnson*, 338 F.3d 382, 393 n.52 (5th Cir. 2003) ("When the State confirmed it would not call [a witness], this should have been a 'red flag' alerting defense counsel that [the witness] may have been useful to the defense").

This Court has held that defense counsel must conduct a *thorough* investigation of the law and facts of the case. *See Wiggins*, 539 U.S. at 521. *See also Stanley v. Bartley*, 465 F.3d 810, 813-14 (7th Cir. 2006); *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003). In light of counsel's constitutional obligation to investigate a defendant's background, the abject failure to do so here requires a conclusion that counsel provided ineffective assistance. *See Wiggins*, 539 U.S. at 522. *See also Tucker*, 716 F.2d at 581 ("Pretrial investigation and preparation are the keys to effective representation of counsel.").

Failure to prepare for capital sentencing. Mr. Hodges had about 30 minutes of preparation with his lawyers before testifying at sentencing. (T. 1001.) Moreover, counsel did not prepare Mr. Hodges to testify, but spent that time trying to convince him not to testify. (Pet. Ex. 6 ¶ 14.) Through inept and unprepared questioning, counsel elicited testimony from Mr. Hodges that exposed him to devastating cross-examination. (T. 1011-14.) Counsel's failure to direct petitioner's testimony prejudiced him because it created an opportunity for impeachment by the State. *See, e.g., Goodman v. Bertrand*, 467 F.3d 1022, 1024 (7th Cir. 2006) (counsel ineffective where, *inter alia*, direct examination led to cross examination regarding two prior felony convictions).

Through this impeachment, the State created the impression that Mr. Hodges was evasive and dishonest about his past criminal offenses, which undoubtedly had an affect on the jury. (T. 1010, 1076-77.) By forcing Mr. Hodges to face the jury while ill-prepared to discuss his criminal background, counsel failed to meet the Constitutional standards required by the Sixth Amendment. *See Strickland*, 466 U.S. at 680-81.

Failure to conduct mitigation investigation. This Court has instructed that counsel's investigation "'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be

introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 524 (citations omitted). A partial mitigation investigation does not satisfy the Sixth Amendment. *See Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (counsel ineffective for failing to conduct a thorough investigation of defendant's mental health and family background for capital sentencing); *Marshall v. Cathel*, 428 F.3d 452, 465 (3d Cir. 2005) (counsel's minimal mitigation investigation constituted "an abdication of his constitutional duty" to prepare for capital sentencing), *cert. denied sub nom. Cathel v. Marhsall*, 126 S. Ct. 1587 (2006).

Counsel has a duty "'to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.'" *Rompilla*, 545 U.S. at 387 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. Supp. 1982)). This duty compels a lawyer to investigate medical and educational history, employment and training history, family and social history, prior juvenile correctional experience, and religious and cultural influences. *See Wiggins*, 539 U.S. at 524-25. "Counsel's failure to follow [] promising leads leaves no 'room for debate' that [his] truncated investigation was deficient." *Harries*, 417 F.3d at 639. Here, even a constitutionally deficient, partial investigation would have been vastly superior to the utter lack of investigation undertaken by Mr. Miller.

The Sixth Amendment required Mr. Miller to perform an investigation sufficient to uncover mitigating facts to reduce the likelihood that Mr. Hodges would receive the death penalty. Mr. Miller did not even discuss possible mitigation evidence with Mr. Hodges. *See Tucker*, 716 F.2d at 581 ("Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant."). Other than allegedly meeting with his mother and aunt, Mr. Miller neither interviewed nor subpoenaed *any* of Mr. Hodges' friends or relatives. *See, e.g., Correll v. Ryan*, 465 F.3d 1006, 1010-11

(9th Cir. 2006) (counsel ineffective for failing to investigate and present case in mitigation at capital sentencing).

Had Mr. Miller performed a mitigation investigation, or employed a mitigation specialist, he would have easily discovered several witnesses available to testify on Mr. Hodges' behalf. (Reply Exs. D, F-P.) These witnesses would have provided powerful mitigating testimony. *See, e.g., Strickland*, 466 U.S. at 718 ("Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections."); *Moore v. Johnson*, 194 F.3d 586, 612 (5th Cir. 1999) ("Mitigating evidence concerning a particular defendant's character or background plays a constitutionally important role in producing an individualized sentencing determination that the death penalty is appropriate. . . .").

Counsel only presented a few witnesses, none of whom touched on the subject of Mr. Hodges' relationship with his mother or Ms. Johnson, or the events of the night of Isaac Johnson's death. *See id.* at 616-17 (counsel ineffective for failing to investigate and present mitigation evidence). These facts might well have influenced the jury's assessment of Mr. Hodges' culpability and increased the likelihood of a different result. *See Wiggins*, 539 U.S. at 522, 534 ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence"); *Rompilla*, 545 U.S. at 393. The Mississippi Supreme Court erred in denying petitioner relief with respect to these ineffective assistance of counsel claims.

II. MR. HODGES' DUE PROCESS RIGHTS WERE VIOLATED WHEN THE MISSISSIPPI SUPREME COURT MANIPULATED PROCEDURAL RULES TO PRECLUDE THE REVIEW OF PERTINENT INFORMATION CRITICAL TO HIS CLAIM OF PROSECUTORIAL MISCONDUCT

"[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (collecting cases). From this simple principle, this Court should grant the instant petition. *See, e.g.*, *Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (granting certiorari and remanding prosecutorial misconduct claim based on allegedly perjured testimony where "[n]o determination of the verity of these allegations appears to have been made."). Not only was the evidence used at Mr. Hodges' sentencing false, it was propounded by a representative of the State. The state court's failure to vindicate Mr. Hodges' due process rights under the Fourteenth Amendment either on direct appeal or in post-conviction proceedings conflicts with relevant decisions of this Court and the weight of due process jurisprudence.

A. The State Committed Prosecutorial Misconduct And Violated The Due Process Clause By Relying On False Testimony

"[I]f the government used false testimony and knew *or should have known* of its falsity, a new trial must be held if there was *any reasonable likelihood* that the false testimony affected the judgment of the jury." *United States v. MMR Corp.*, 954 F.2d 1040, 1047 (5th Cir. 1992) (first emphasis added); *United States v. Iverson*, 637 F.2d 799, 801 (D.C. Cir. 1980) ("[A] conviction obtained by the knowing use of perjured testimony violates the defendant's right to a fair trial mandated by the due process clauses of the Fifth and Fourteenth Amendments."), *modified*, 648 F.2d 737 (D.C. Cir. 1981). The

law is clear that the only issue is whether the State *should have known* the testimony was false. In *Giglio v. United States*, the Court ruled that where, as here, both attorneys worked for the government, the prosecution "should have known" that the testimony was false. 405 U.S. 150, 154 (1972).

The harm here occurred not only from the submission of false testimony by ADA Kitchens, but also through the State's questioning of the two key defense witnesses at the penalty phase. "[I]t is improper conduct for the Government to ask a question which implies a factual predicate which the examiner knows he cannot support by evidence. . . ." *Cf. United States v. Elizondo*, 920 F.2d 1308, 1313 (7th Cir. 1990) (quotations and citation omitted).

At sentencing, the State relied heavily on its theory that the decedent's mother, Ms. Tatum, had interceded on Mr. Hodges' behalf in an earlier burglary case by asking that he not receive the 15-year prison sentence allegedly sought by the State. (T. 983-86, 1016-17.) The State's theme was that Mr. Hodges killed Ms. Tatum's son even though she had previously saved Mr. Hodges from a lengthy prison term. This, the State claimed, justified executing Mr. Hodges.

As discussed above, the State set up its argument with the cross-examination of Mr. Hodges and his mother regarding the prior plea hearing. (T. 985-88, 1016-17.) After Mr. Hodges and his mother denied hearing either that Ms. Tatum interceded on petitioner's behalf or that the State sought 15 years, the State called ADA Kitchens as a rebuttal witness. Mr. Kitchens testified with great specificity that Ms. Tatum "said she did not want him to go to the penitentiary," and that the State sought to imprison Mr. Hodges for 15 years. (T. 1025-30.) In his closing argument in Mr. Hodges' capital trial, the district attorney repeated these assertions and indicated that Mr. Hodges was being dishonest in failing to acknowledge them. (T. 1077.)

The State's description of the prior burglary hearing was patently false. The hearing transcript shows that:

- Contrary to Mr. Kitchens' testimony that he made specific representations to the court, he was not even the prosecutor who spoke for the State. (Pet. Ex. 1.)
- Contrary to the indication by Messrs. Allgood and Kitchens that the court was told that the State sought a 15-year sentence, Mr. Rogillo, the ADA who handled that hearing, told the judge that the State had no sentencing recommendation. (*Id.* at 1-10.)
- Contrary to Mr. Kitchens' testimony that he met with Ms. Tatum in the library, Mr. Rogillio stated on the first day that he had not reached Ms. Tatum, and stated on the second day of the hearing that "she would like her victim's impact statement to speak for her" and "she still feels . . . he should be punished." (*Id.* at 5-10.)
- Contrary to Mr. Kitchens' testimony that Ms. Tatum told him she wished Mr. Hodges to be spared prison, neither the State nor defense counsel ever made any such statements to the court. Prior to imposing sentence, the judge specifically noted that the State made no recommendation as to sentence. (*Id.* at 16.)

The State has never disputed these contradictions; nor could it in the face of the plea hearing transcript. Rather, in an effort to cure these defects, the State submitted affidavits as part of its post-conviction response. Mr. Kitchens, in his affidavit, explains that although Mr. Rogillio conducted the proceedings, Mr. Kitchens was in the courtroom. The problems with Mr. Kitchens' testimony are not cured by this assertion. If Mr. Kitchens had been in the courtroom when Mr. Rogillio offered no recommendation as to sentence, as noted on the record by the judge, Mr. Kitchens did nothing to correct the record. Indeed, contrary to his trial testimony, Mr. Kitchens admits that "Mr.

Hodges pled guilty with no recommendation from the State." (Resp. Ex. A at 1.) The affidavit refers to an "offer" and "recommendation" for a 15-year sentence, but it never states that this was communicated to the court and it was certainly never discussed in open court. Significantly, Mr. Rogillio's affidavit mentions no such recommendation. (Resp. Ex. B.)

These facts demonstrate that the questions posed by the State were improper, as was the suggestion in closing argument that Mr. Hodges was not telling the truth. *See, e.g., United States v. Brown*, 519 F.2d 1368, 1370 (6th Cir. 1975) ("Laying such prejudicial allegations before a jury by dint of cross-examination without being prepared to prove them is generally regarded as reversible error"). The testimony of Mr. Kitchens in the sentencing phase of Mr. Hodges' case was improper and erroneous. Given the State's reliance on this evidence in closing argument, there is a strong likelihood that the jury relied on all of that as well, not only for the alleged facts but also for the negative light that this testimony cast upon Mr. Hodges and his mother. *See, e.g., State v. Holsinger*, 601 P.2d 1054, 1057-58 (Ariz. 1979) (reversing conviction where State's cross-examination "clearly implied that the defendant had a long criminal record when, in fact, she did not"); *People v. Lueck*, 182 N.E.2d 733, 733-34 (Ill. 1962) (reversing conviction as violation of due process where based on perjured testimony). "[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." *Miller v. Pate*, 386 U.S. 1, 7 (1967). As this Court made clear in *Miller*, "[t]here has been no deviation from that established principle. There can be no retreat from that principle here." *Id.* (citations omitted).

B. The Mississippi Supreme Court's Refusal To Consider Evidence Demonstrating That The State Presented False Testimony Also Constitutes A Violation Of Mr. Hodges' Constitutional Due Process Rights

"Since the prosecution has the constitutional duty to reveal at trial that false testimony has been given by its witness, it cannot, by failing in this duty, shift the burden to discover the misrepresentation after trial to the defense." *Smith v. Zant*, 301 S.E.2d 32, 37 (Ga. 1983) (applying *Napue* and *Giglio*). Concepts of federalism and comity demand that state courts vindicate the federal constitutional rights of criminal defendants. As this Court has observed:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.

Howlett v. Rose, 496 U.S. 356, 367 (1990). The Supremacy Clause of the Constitution requires the several states to enforce the federal rights of those convicted under state law. *See id.* at 367, 372-73 ("[S]tate courts share responsibility for the application and enforcement of federal law."). *See also Testa v. Katt*, 330 U.S. 386, 390-91 (1947). The Mississippi Supreme Court's refusal to consider the plea hearing transcript based on procedural grounds in resolving Mr. Hodges' prosecutorial misconduct claim violated due process. *Cf. Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ("[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."); *Howlett*, 496 U.S. at 366 (same).

To be sure, state courts may apply their procedural rules in evaluating a federal claim; however, "[i]n every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest." *Henry*, 379 U.S. at 447. "If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." *Id.* at 448-49. As applied to Mr. Hodges' case, the State's interest in its procedural rule is not served by its enforcement. *Cf. Michel v. Louisiana*, 350 U.S. 91, 93-95 (1955) (rejecting claim for failure to file objections before deadline established by state procedure, but noting that "[t]he test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the State court'" (collecting authorities; citation omitted)).

The State cross-examined petitioner and his mother extensively regarding the purported colloquy at the prior plea hearing. (T. 983-86, 1016-17.) Not satisfied with its cross-examination, the State put on the "rebuttal" testimony of ADA Kitchens whose testimony about that proceeding was false. (T. 1025-30.) The State relied on this theme in its closing argument at sentencing. (T. 1077.) Then, despite twice being presented with this clear evidence of falsity, the Mississippi Supreme Court refused to vindicate Mr. Hodges' due process rights.

Mr. Hodges presented his due process claim on direct appeal, supported by the hearing transcript. *See* App. 64a-66a. Having denied Mr. Hodges' motion to expand the record, the Mississippi Supreme Court refused to consider the transcript in resolving this claim. *See id.*[7] Addressing the merits of the claim despite the lack of objection at trial, the Court held that Mr. Hodges had not established the requisite elements of a

7. The Court considered non-record evidence regarding some ineffective assistance claims. *See* App. 83a.

prosecutorial misconduct claim. *See* App. 66a.[8] The Court found that he "has not offered any proof that Kitchens' testimony was false, that it was material to the verdict or that the State knew that it was false." *Id.* On post-conviction review, the Court again refused to consider the transcript and held that the issue was *res judicata*. *See* App. 13a.

The state court's failure to consider this transcript resulted from a procedural shell-game that precluded any vindication of Mr. Hodges' due process rights. In *Branch v. State*, issued while Mr. Hodges' direct appeal was pending, the Mississippi Supreme Court held that it would consider extra-record evidence in resolving *Atkins* and ineffective assistance of counsel claims on direct appeal. 882 So. 2d 36, 49 (Miss. 2004). The Court stated that "[i]f new counsel on direct appeal is required to assert collateral claims, *there must be an opportunity to submit extraneous facts and discovery and evidentiary hearing to develop and prove the allegations*." *Id.* (emphasis added; collecting cases). At the time *Branch* was decided, and as applicable to Mr. Hodges, the Mississippi Rules of Appellate Procedure provided that "[i]ssues which may be raised in post-conviction proceedings may also be raised on direct appeal." Miss. R. App. P. 22(b) (prior to amendment). That rule further provided that, where the appellant is represented by new counsel on appeal, "the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings." *Id.* In other words, at the time of Mr.

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8. "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 326-28 (1985) (granting certiorari and reversing death sentence despite failure to raise issue on appeal). Here, the state court noted the procedural bar, but "consider[ed] the merits of Hodges' argument." App. 64a-66a.

Hodges' direct appeal, his claim of prosecutorial misconduct would have been barred had he not raised it and, consistent with *Branch*, proffered the plea hearing transcript as evidence.

Shortly before the state court issued its decision on petitioner's direct appeal, the first sentence of Rule 22 was amended to provide that: "Issues which may be raised in post-conviction proceedings may also be raised on direct appeal *if such issues are based on facts fully apparent from the record*." Miss. R. App. P. 22(b) (amended text italicized). Although the Court expressly disavowed reliance on amended Rule 22(b), it noted the rule "[t]o make it clear what this Court can consider on direct appeal *in future cases*." App. 64a-65a (emphasis added). The Court noted in a later opinion that its decision on Mr. Hodges' direct appeal "clarified" its earlier decision in *Branch* whereby the latter decision was "limited to a consideration of Branch's *Atkins* issues as it related to perceived ineffective assistance of trial counsel." *Havard v. State*, 928 So. 2d 771, 786 (Miss. 2006), *cert. denied*, 127 S. Ct. 931 (2007). There, the court refused to consider a juror affidavit in support of an ineffective assistance of counsel claim on direct appeal and rejected the claim on the merits; however, the Court held that "[h]aving raised this issue with different counsel on direct appeal, Havard has preserved his right to raise this issue, supported by affidavits, in future post-conviction relief proceedings." *Id.* Notwithstanding disavowing reliance on new Rule 22, the Court – in contravention of then-applicable Rule 22 and then-prevailing law under *Branch*, rejected consideration of the critical evidence (the plea hearing transcript) and then ruled adversely on the substance of the claim on the grounds that there was no supporting evidence. *See* App. 66a.

As this Court has held: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek

vindication in state court of their federal constitutional rights." *NAACP v. Alabama*, 357 U.S. 449, 575-58 (1958). Mississippi has failed to vindicate Mr. Hodges' due process rights, a violation of due process itself. Its novel procedural requirements for the presentment and preservation of issues on direct appeal and in post-conviction proceedings violated Mr. Hodges' due process rights.

Stated otherwise, the state court's decision was either an "obvious subterfuge to evade consideration of a federal issue," *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (quotations and citations omitted), or a "'plainly untenable'" interpretation of its procedural rules. *Cf. Buehl v. Vaughn*, 166 F.3d 163, 174-75 (3d Cir. 1999) (quoting *Ward v. Bd. of County Comm'rs*, 253 U.S. 17, 22 (1920)). Although Mr. Hodges twice presented this claim to the Mississippi Supreme Court, it refused to consider clear evidence of the falsity of then-ADA, now-Judge Kitchen's testimony, but then ruled on the merits and, ironically, found Mr. Hodges submitted no evidence in support of the claim. *See* App. 66a. The Court's *res judicata* ruling on post-conviction review, *see* App. 13a, was an "obvious subterfuge" to avoid vindicating Mr. Hodges' due process rights at the expense of a sitting state court judge. *Cf. Radio Station Wow, Inc. v. Johnson*, 326 U.S. 120, 129 (1945) ("[I]t is not for us to consider the correctness of the non-federal ground unless it is an obvious subterfuge to evade consideration of a federal issue.").

The Mississippi Supreme Court's decision also constitutes a "plainly untenable" interpretation of its rules. *Ward*, 253 U.S. at 22 ("It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support."). Here, the state's application of its rules

creates a disincentive to appellate counsel to investigate; indeed, Mr. Hodges was punished for appellate counsel's diligence. Appellant counsel located evidence supporting petitioner's claims and submitted that material on direct appeal in accord with then-existing Rule 22(b). The Court refused to consider this plainly relevant evidence, rejected the claim on the merits because it refused to consider such pertinent evidence, and then held its decision was *res judicata* on post-conviction. *See* App. 11a-13a; App. 64a-66a. On the other hand, if counsel had not submitted the evidence on direct appeal, the State could argue that petitioner waived consideration of such evidence by failing to present it on direct appeal. This procedural Catch-22 is a "plainly untenable" interpretation of state procedural rules. *See Napue*, 360 U.S. at 271-72 ("[O]ur own evaluation of the record here compels us to hold that the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial." (collecting cases)).

Alternatively, the Court should review the application of *res judicata* in this case. *See, e.g., Richards v. Jefferson County, Alabama*, 517 U.S. 793, 797 (1996) ("We have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" (citation omitted)); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167 (1999) (same). This Court noted in *Henry*:

> The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the States would look upon our [prior decisions], as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims. That prospect is better

> served by a remand than by relegating petitioner to his federal habeas remedy.

379 U.S. at 453 (footnote omitted).[9] "'[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.'" *Caldwell*, 472 U.S. at 329 n.2, 341 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). By this petition, Mr. Hodges simply seeks the same protection from the State of Mississippi.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner Quintez Wren Hodges, respectfully requests that this Court grant this Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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9. Several circuits have criticized a state court's failure to address such issues. *See, e.g.*, *Anderson v. Sirmons*, 476 F.3d 1131, 1141 n.9 (10th Cir. 2007) (questioning whether petitioner could have raised ineffective assistance claims in Oklahoma state court based on procedural requirements).